



Claimant contends Judge Howard erred. Claimant argues he injured his back, hips, and right leg on July 19, 2004, when he fell while climbing out of a truck trailer. Accordingly, claimant requests the Board to reverse the February 15, 2006, Order.

Conversely, respondent and its insurance carrier contend the Order should be affirmed. They argue the Judge correctly determined claimant was not credible and, therefore, claimant failed to prove he sustained a work-related accident.

The only issue before the Board on this appeal is whether claimant sustained personal injury by an accident that arose out of and in the course of his employment with respondent.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the record compiled to date and considering the parties' arguments, the Board finds and concludes the February 15, 2006, Order should be affirmed.

Respondent employed claimant to load its truck trailers. At the December 7, 2004, preliminary hearing, which was the first preliminary hearing held in this claim, claimant testified he injured his back when he slipped and fell to the floor or ground as he stepped down from a trailer. Moreover, claimant testified he remained on the floor or ground for 25 minutes before going inside and telling his supervisor, William M. Roberts, Jr., that his back hurt. Claimant described the alleged incident, as follows:

Yes. I parked my trailer, 436, and upon doing that I decided to step down from the trailer. That's when I slipped and I fell on my back and hurt it. It took me 25 minutes on the floor and then I went inside and I told my supervisor that my back hurt, if I could go.

. . . .

He told me no, that I had to wait until everybody else would leave and then I told the rest of my workmates.<sup>2</sup>

But on cross-examination, claimant clarified he slipped as he was climbing down from the tractor rather than the trailer.

Q. (Ms. Haskins) Now, when this accident occurred you were in a trailer?

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<sup>2</sup> P.H. Trans. (Dec. 7, 2004) at 5-6.

A. (Claimant) I parked the trailer, stepped down from the trailer, and that's when I slipped.

Q. Are you talking about the tractor, the driving part of the vehicle?

A. Yes, tractor.

Q. So how were you stepping down?

A. I grabbed the wheel and I turned and I stepped down. This was the trailer and I turned around and I stepped with this foot and I slipped and I tried to grab something but I couldn't so I hit my back.<sup>3</sup>

Approximately three days later, on July 22, 2004, claimant took a medical note to respondent from Dr. Yama Zafer, a chiropractor. Claimant speaks Spanish and he is not proficient with English. Accordingly, a co-worker (Alfredo) translated for claimant and advised respondent that claimant had sustained an injury when he fell from trailer 436. Respondent then referred claimant for medical treatment.

Claimant then saw Dr. Gary Legler, who prescribed physical therapy, work restrictions and an MRI. On August 25, 2004, claimant underwent an MRI, which indicated he had lower lumbar degenerative disc disease with L5-S1 retrolisthesis and facet hypertrophy. According to Dr. Legler's notes, claimant's accident occurred as he was "getting into a truck" and "apparently slid off the seat and then bounced from the step of the truck and finally landed on his buttocks in the parking lot."<sup>4</sup>

Dr. Legler's August 12, 2004, office notes indicate that claimant denied that pain radiated into his lower extremities. But at his next office visit on August 18, 2004, claimant complained of occasional radiating pain into his *left* leg. Dr. Legler referred claimant to Dr. Ira H. Fishman, who also restricted claimant's work activities.

According to claimant, he was told to clean bathrooms when he gave Dr. Fishman's restrictions to respondent. But claimant and respondent disagreed whether that job violated his medical restrictions. And ultimately respondent advised claimant he would clean the bathrooms or he would be fired. On September 20, 2004, respondent terminated claimant's employment.

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<sup>3</sup> *Id.* at 35.

<sup>4</sup> P.H. Trans. (Feb. 14, 2006), Resp. Ex. B.

The record indicates claimant treated with Dr. Fishman during September and October 2004. The doctor first saw claimant on September 3, 2004, and noted that claimant slipped while climbing out of a truck trailer and fell, striking the lower portion of his back on a ladder rung before striking his back against the ground.

On October 25, 2004, Dr. Fishman released claimant from his care with no restrictions due to a normal EMG study and a physical examination that failed to yield any significant objective findings.

Dr. Fishman noted in his records that claimant displayed considerable pain behavior and symptom magnification. The doctor's September 16, 2004, notes read in pertinent part:

It was clearly indicated by his treating therapist that Mr. DelValle displayed positive Waddell's signs of symptom magnification involving simulated axial loading as well as straight leg raising distraction, generalized weakness/regional weakness, and give-way weakness with lower extremity manual muscle testing. There were also inconsistencies noted in that he demonstrated limited lumbar mobility in all ranges when measured. However, when observed during his evaluation, he was able to move his lumbar spine to normal range.<sup>5</sup>

And the doctor's October 6, 2004, notes read, in part:

I was able to review Mr. Delvalle's latest physical therapy progress note from the SERC facility in Olathe. It was extensively documented that Mr. Delvalle continued to display considerable pain behavior with poor tolerance for his low-level spinal stabilization and flexibility exercises. He also did not put forth maximal effort and was noted to display breakaway weakness with muscle testing.<sup>6</sup>

Moreover, Dr. Fishman's October 6, 2004, office notes also indicate on that date claimant first complained about numbness and paresthesias in his *right* leg, which claimant had not previously noted in the clinic's pain drawings.

In November 2004, claimant saw Dr. Joseph F. Galate. Dr. Galate recorded a history that claimant's back pain began in June 2004 when he slipped from the back of a truck and fell 30 feet.

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<sup>5</sup> P.H. Trans. (Dec. 7, 2004), Cl. Ex. 1.

<sup>6</sup> *Id.*

Another version of claimant's accident is set forth in the applications for hearing that were filed with the Division of Workers Compensation. In those documents, which claimant purportedly signed, claimant alleged he slipped while descending a flight of stairs.

On the other hand, William M. Roberts, Jr., who was claimant's immediate supervisor, testified claimant did not report he had been injured at work until several days after the alleged incident. Mr. Roberts remembered, in part:

Juan [claimant] came to me and he wanted to get out of driving that night, and I had nobody else to take his place and I said no. And he said, well, he was going to get injured. And so I wrote it up and just kind of blew it off actually. And I believe this was on -- it was either a Thursday or Friday, and he came to me on Monday saying he hurt his back. I believe it was a Monday, Monday or Tuesday, but anyway, it was three or four days lapsed between the time he said he did it and the time he notified me.

And so at that time I sent him to the doctor which is practice. I mean, if anybody hurts their back we send them to our company doctor. I sent him to the company doctor and they put him on light duty.<sup>7</sup>

The Board affirms Judge Howard's conclusion that claimant's credibility is questionable. It is not reasonable to believe that claimant sustained an injury that completely debilitated him for 25 minutes and that he failed to report the alleged severity of that incident to his supervisor for several days.

As there were no witnesses to claimant's alleged accident, the claim hinges upon claimant's credibility. Considering the entire record, the Board affirms the Judge's finding that claimant has failed to prove he injured his back while working for respondent. In addition to the various descriptions of the accident, which could be partially attributed to claimant's lack of proficiency in speaking English, there are also questions regarding the validity of claimant's symptoms.

In his application for review, claimant requested oral argument before the Board. After reviewing the parties' briefs and considering the parties' arguments, the Board concluded that oral argument would provide little, if any, additional benefit. Accordingly, the Board left this claim on its summary docket for disposition without oral argument.

**WHEREFORE**, the Board affirms the February 15, 2006, Order entered by Judge Howard.

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<sup>7</sup> Roberts Depo. at 4-5.

**ALBERTO MUNOZ a/k/a  
JUAN MANUEL DEL VALLE**

**DOCKET NO. 1,019,332**

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of April, 2006.

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BOARD MEMBER

c: Thomas R. Fields, Attorney for Claimant  
Michelle Daum Haskins, Attorney for Respondent and its Insurance Carrier  
Steven J. Howard, Administrative Law Judge  
Paula S. Greathouse, Workers Compensation Director